LEE BROTHERS DREDGING CO.

IBLA 84-155 Decided March 21, 1984

Appeal from a decision of the Alaska State Office, Bureau of Land Management, dismissing protest of mineral patent application F-72877.

Affirmed.

1. Mining Claims: Patent

Failure of the holder of a mining claim to file an adverse claim within the 60-day publication period set forth in 30 U.S.C. §§ 29, 30 (1976) amounts to a waiver of any rights to a claim against the mineral patent applicant for a conflicting claim.

2. Rules of Practice: Appeals: Standing to Appeal

Unless a party asserts an "adversely affected" interest, it does not have standing to appeal under 43 CFR 4.410 and its appeal will be dismissed.

APPEARANCES: A. T. Wendells, Esq., Seattle, Washington, for appellant; George Trefry, Esq., Anchorage, Alaska, for respondent.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Lee Brothers Dredging Company (Lee Brothers) appeals from an October 27, 1983, decision of the Alaska State Office, Bureau of Land Management (BLM), dismissing its protest against the allowance of mineral patent application F-72877. This application was filed on February 12, 1981, by Alaska Placer Company for its placer mining claims known as the Cape Creek Group. 1/ Alaska Placer Company has responded.

The protest, received November 3, 1982, from Lee Brothers' president, Richard E. Lee, was against the patenting of Cape Creek #1 claim, F-54808, located August 17, 1935, and was grounded in part on discrepancies between the claim dimensions stated in the location notice and those determined by Mineral Survey 2199, approved May 15, 1958. In 1969 Lee Brothers had located

1/ For background on the Cape Creek claims, see Alaska Placer Co., 33 IBLA 187, 84 I.D. 990 (1977).

mining claims which conflict with Cape Creek #1, using the metes and bounds description in the location notice for Cape Creek #1 to establish these other claims. It also alleged in its protest that an amended location notice was not recorded which incorporates the distances established by the mineral survey, and that corner monuments for Cape Creek #1 were not in place.

BLM dismissed the protest for the following reasons: (1) The protest was not accompanied by the nonrefundable service charge as required in 43 CFR 3872.1(b); (2) the protestant failed to assert an adverse interest; (3) the Department is without authority to determine the question of right to possession as between rival mining claimants, W. W. Allstead, 58 IBLA 46 (1981); and (4) the protest was unfounded in all respects.

In addition, BLM addressed part of the issues presented in the protest as follows:

> Mineral Survey application No. 2199 of Cape Creek #1 claim was initiated by Ralph Lomen and H. G. Gabrielson, who were the owners of the Cape Creek Group claims at the time of survey in October of 1957. Mineral Survey No. 2199 was performed on a contiguous group of placer claims known as the Cape Creek Group, including the Cape Creek #1 claim and adjacent Beach claim, on October 25, 1957 and completed on November 2, 1957. The survey was executed by Wayne C. Harrigan as mineral surveyor. The plat for Mineral Survey No. 2199, Alaska, was conformed to the field notes of said survey, examined and approved on May 15, 1958, by Lyle F. Jones, BLM Area Cadastral Survey Officer.
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> The field notes for Mineral Survey No. 2199 describe the area of the Cape Creek #1 claim as 16.920 acres and Beach placer claim as 29.925 acres. Further, the field notes give the location as "unsurveyed ground at Tin City on the Seward Peninsula, Alaska. The tie line on the ground is found on U.S. Land Monument (USLM) No. 336 which is at latitude 65 degrees 34'34.9" N. and longitude 167 degrees 59'41.7" W.". The field notes further state that the surveyor found the location of the claims marked on the ground and that his survey was "identical with the respective location as marked on the ground." (Emphasis added).
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> The standard for a description on a location notice is that "an intelligent person with the knowledge of the permanent natural objects and permanent monuments in the vicinity" can find the claim by reading the description and finding the marked corners. Flynn v. Velvestad, 119 F. Suppl. 93 (1954), affirmed 230 F 2d 695, cert. denied 352 US 827. It is not essential that the description on the notice give the bearings and distances between monuments with absolute accuracy, as it is recognized that prospectors may not have had access to surveying equipment. Thus a location is not invalidated on the basis of slight errors or inaccuracies in the bearings and distances so long as the claim boundaries are sufficiently marked. J. E. Ruby Inv. Co. v.

> Sakow, 98 F2d 8 (1938). If there is a discrepancy between the stakes or markers on the ground of a mining claim and the recorded location certificate, the claim as marked on the ground controls over the description in the location certificate. Sturlevant v. Vogel, 167 F 448, 452 (1909). See also 30 U.S.C. Sec. 34 (RS 2327). The temporary loss or destruction of a posted notice or location monument does not affect the validity of the claim. Gird V. California Oil Co., 60 F 531, 539. [Emphasis in original.]

Decision at 2-5.

In its statement of reasons, Lee Brothers claims BLM improperly dismissed its protest because the Alaska Placer Company did not comply with the requirements for a valid entry and sets forth its several allegations concerning the validity of Cape Creek #1. 2/ However, it fails to address the reasons why its protest was dismissed, except that the $10 nonrefundable fee was paid. 3/

[1] 30 U.S.C. §§ 29 and 30 (1976) require an applicant for mineral patent to publish notice of the application for a period of 60 days. 4/

2/ In addition to the allegations presented in the protest, appellant asserts in the statement of reasons that the claim exceeded the maximum claim dimensions established by 30 U.S.C. § 23 (1976). However, that section pertains to lode claims and the claim at issue is a placer claim subject to the limitations in 30 U.S.C. § 35 (1976). While this section does restrict placer locations to 20 acres per participating individual, the subject claim is recorded as consisting of only 16.92 acres.

3/ Despite the declaration that the check enclosed with the notice of appeal was "in payment of the $10 non-refundable service charge noted as a deficiency in the Decision of October 13, 1983," BLM returned it with the notation, "There is no filing fee for the filing of 'Notice of Appeals'." Although tender was made but returned, appellant remains liable for and should resubmit the $10 protest fee.

4/ BLM described the act of publication as follows:

"In accordance with the regulations pertaining to mineral patent applications requiring publication of the Notice of Application (43 CFR 3862.4), Alaska Placer Company's Notice was published in the Nome Nugget newspaper for nine weeks from September 3, 1981 to October 29, 1981. No adverse claims were filed during the 60 day period of publication. In addition, the BLM Fairbanks District Land Office posted a copy of the Notice of Application by Alaska Placer Company on the bulletin board for public view from September 3, 1981 until June 24, 1982, as attested to by Lennie Eubanks, BLM, Chief, Branch of Land Office." [Emphasis in original]. Decision at 3.

Appellant charges noncompliance with the companion requirement to properly post a copy of the claim plat and the patent application, but does not address that portion of BLM's decision which appeared as follows:

"An examination of Alaska Placer Company's mineral patent application reveals that on November 6, 1980, the Notice of intention to apply for patent and Mineral Survey No. 2199 plats were posted on the Cape Creek #1 claim. Two witnesses to such postings made affidavits stating that they were present

The holder of a conflicting claim must: (1) file his intention to assert an adverse claim with the proper BLM office within the publication period; (2) within 30 days therefrom initiate proceedings in a court of competent jurisdiction to determine the right of possession; and (3) prosecute the proceedings with reasonable diligence to final judgment. Failure of the holder of a mining claim to file an adverse claim within the 60-day publication period amounts to a waiver of any rights to a claim against the mineral patent applicant for a conflicting claim. See Essex International, Inc., 15 IBLA 232, 241-42, 81 I.D. 187, 191-92 (1974), and cases cited therein; see also 43 CFR Subpart 3871. The hoary citations offered by respondent serve to show that this has always been the rule. Wright v. Tabor, 2 L.D. 738 (1884); Davidson v. Eliza Gold Mining Co., 28 L.D. 224 (1899); Opie v. Auburn Gold Mining Co., 29 L.D. 230 (1899).

While Congress has stated in 30 U.S.C. § 29 (1976) that after the period for adverse claims to be filed has expired "no objection from third parties to the issuance of a patent shall be heard," Congress also provided an exception for protestants to show that the patent applicant has failed to comply with the requirements for patent. The pertinent Departmental regulation, 43 CFR 3872.1, provides in part:

> (a) At any time prior to the issuance of patent, protest may be filed against the patenting of the claim as applied for, upon any ground tending to show that the applicant has failed to comply with the law in any matter essential to a valid entry under the patent proceedings. Such protest cannot, however, be made the means of preserving a surface conflict lost by failure to adverse or lost by the judgment of the court in an adverse suit. 5/

This is the procedural vehicle selected by Lee Brothers to present its protest against Cape Creek #1. An adverse claim under 43 CFR Subpart 3871 filed at that time would have been rejected as untimely.

This Department has held that the adverse claimant who fails to adverse may not thereafter assert his own claim as a bar to the issuance of a mineral patent to the applicant, but he may protest to show that the patent applicant has not complied with the requirements for patent. Chemi-Cote Perlite Corp. v. Bowen, 72 I.D. 403, 406 (1965).

In addressing the issue of who may protest, the Board has more recently remarked as follows:

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fn. 4 (continued)
on November 6, 1980, when such postings were made by Alaska Placer Company. The same two witnesses, Mr. Larry Kitchner and Mr. Bruce Edward Brightman, also signed affidavits acknowledging that Alaska Placer Company's mining claim premises were unreserved, unoccupied, unimproved and unappropriated by any person and/or entity claiming the same, other than the applicant, Alaska Placer Company." [Emphasis in original]. Decision at 3.

5/ This regulation appears as it was originally published in 1922. See Regulations, 49 L.D. 58, 72, par. 53 (1922).

> We recognize, of course, that ultimately it is the Department's responsibility to determine whether a patent applicant has complied with the mining laws. In this sense, it could be argued that any protest or even private contest of a patent application is made as an amicus curiae, since the ultimate purpose is to assist the Department in its affirmative obligation to safeguard the public domain "to the end that valid claims may be recognized, invalid ones eliminated, and the right of the public preserved." Cameron v. United States, 252 U.S. 450, 460 (1920).

In re Pacific Coast Molybdenum, 68 IBLA 325, 333 (1982).

[2] While it is stated that an adversely affected interest may not be necessary when filing a protest, there are two separate and discrete prerequisites to prosecution of an appeal before this Board: (1) that the appellant be a "party to the case," and (2) that the appellant be "adversely affected" by the decision appealed from. 43 CFR 4.410. Denial of a protest makes an individual a party to the case. Such a denial, however, does not establish that an individual is adversely affected. In re Pacific Coast Molybdenum, supra. As noted, the failure to adverse a mineral patent application estops an adverse claimant from asserting his conflicting claim against the issuance of a patent under the mining laws. Turner v. Sawyer, 150 U.S. 578 (1893); Paula Troester Saragosa, 53 IBLA 247, 250 (1981).

Without the ability to assert its conflicting claims, appellant appears as a party merely interested in the disposition of the patent application. Where a party cannot assert a cognizable interest which has been adversely affected, it does not have standing to appeal under 43 CFR 4.410, and its appeal will be dismissed. Oregon Natural Resources Council, 78 IBLA 124 (1983).

Lee Brothers protested the validity of Cape Creek #1 claim and its protest was reviewed by BLM. The applicable statutes and Departmental authority provide that, in view of its own failure to timely protect its conflicting claims, such protest fully constitutes the procedural protection to which it is entitled.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Bruce R. Harris
Administrative Judge